No. 89-1574 and No. 89-1587

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
GENERAL MOTORS ACCEPTANCE CORPORATION, and
GMAC LEASING CORPORATION,
Petitioners,

v.

DEPARTMENT OF REVENUE, STATE OF ALABAMA,
Respondent.

REYNOLDS METALS COMPANY,
Petitioner,

v.

JAMES M. SIZEMORE, JR.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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On Petition for Writ of Certiorari to the Supreme Court of Alabama *

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Committee on State Taxation of the Council of State Chambers of Commerce hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consents of the Attorneys for the Petitioners have

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* These two cases were consolidated by the Alabama Supreme Court as *White v. Reynolds Metals Company*, Alabama Supreme Court No. 89-386.

been obtained. The consent of the Attorney for the Respondent was requested and refused.**

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce. The Committee on State Taxation (COST), one of the three advisory committees of the Council, consists of 340 corporate members, including petitioners, who conduct a substantial portion of the interstate commerce of United States taxpayers.

COST's objective is to preserve and promote equitable and non-discriminatory state taxation of corporations engaged in business enterprises in more than one taxing jurisdiction. The promotion of a domestic marketplace free from discriminatory tax policies will enhance the ability of businesses to effectively compete in a free market. Member companies of COST are representative of that part of the Nation's business sector which is directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as the instant case in which a discriminatory tax scheme places out-of-state corporate taxpayers at a competitive disadvantage solely because of their status as out-of-state corporations.

In its decision, the Alabama Supreme Court destroyed the protection afforded by the Commerce Clause to interstate businesses in Alabama. The Alabama Supreme Court allowed a patently and facially discriminatory tax, which taxes out-of-state corporations more harshly than in-state corporations, to be imposed, notwithstanding the Commerce Clause. Thus, if this Court allows this decision to stand, other states will be encouraged to adopt similarly discriminatory tax schemes. A State would have complete latitude to raise revenues at the expense of out-of-state taxpayers. This could extend to all state taxes

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** The consents of the Petitioners and the response of the Respondent have been filed with the Clerk of this Court.

and could force corporations to make business decisions based on tax driven factors, rather than marketplace factors.

As taxpayers engaged in interstate business, COST members are directly impacted by the decision of the Alabama Supreme Court. Therefore, COST urges that leave be granted to file a brief as *amicus curiae* in support of Petitioners' petition for writ of certiorari and respectfully so moves the Court.

Respectfully submitted,

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On Petition for Writ of Certiorari to the Supreme Court of Alabama *

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxaiton of the Council of State Chambers of Commerce as

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* These two cases were consolidated by the Alabama Supreme Court as *White v. Reynolds Metals Company*, Alabama Supreme Court No. 89-386.

amicus curiae in support of the petitioners' petitions for writ of certiorari in the above-captioned cases.

INTEREST OF *AMICUS CURIAE*

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

The test to be applied in determining whether a state taxing statute is constitutional under the Commerce Clause has been well established by this Court. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1974), the Court set forth a four prong test, under which a tax will withstand Commerce Clause scrutiny if the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. This test has been consistently applied by this Court in numerous Commerce Clause challenges. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981), *Armco v. Hardesty*, 467 U.S. 638 (1984), *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), *American Trucking Associations, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987), *Goldberg v. Sweet*, 109 S.Ct. 582 (1989).

Despite the clear precedents set forth by this Court, the Alabama Supreme Court created its own Commerce Clause test, which not only is at odds with the test required by this Court, but which effectively deprives the Commerce Clause of any force in protecting interstate commerce from discrimination in Alabama. There is no support for the Alabama Court's attempt to require "invidious" discrimination before finding a state tax law unconstitutional under the Commerce Clause. Rather, this Court's decisions make clear that any discrimination

against interstate business is sufficient to find a state tax statute unconstitutional. Further, there is no support for the Alabama Court's attempt to justify the State's discriminatory treatment of out-of-state corporations by comparing the tax on foreign corporations with a composite of taxes imposed on domestic corporations or their shareholders. Such an analysis has been rejected by this Court since it "would plunge the Court into a morass of weighing comparative tax burdens." *American Trucking Associations, Inc. v. Scheiner*, 107 S.Ct. at 2843.

The Alabama Supreme Court recognized that discrimination existed in the State's taxation of out-of-state corporations. Therefore, had it correctly applied the Commerce Clause analysis required by this Court, it would have found the Alabama law discriminated against interstate commerce in violation of the Commerce Clause.

ARGUMENT

THE DECISION OF THE ALABAMA SUPREME COURT UPHOLDING A TAX THAT DISCRIMINATES, FACIALLY AND IN EFFECT, AGAINST OUT-OF-STATE CORPORATIONS VIOLATES THE COMMERCE CLAUSE STRICTURES SET FORTH BY THIS COURT

Under the Alabama tax scheme, out-of-state corporations are subject to a net worth tax of $3 per $1,000 of "the actual amount of . . . capital employed" in the State. Ala. Code sec. 40-14-41(a). The term "capital" includes the par value of the corporation's outstanding capital stock, surplus, including paid-in surplus, capital surplus, and retained earning, long-term debt, and certain other debt, and accelerated depreciation. Ala. Code sec. 40-14-41(b). Alabama domestic corporations are not subject to the same tax or a comparable tax. Rather, the tax base for a domestic corporation is limited to the par value of a corporation's stock. Ala. Code sec. 40-14-41. The Alabama Supreme Court, below, recognized that this tax scheme

discriminated against out-of-state corporations. *White v. Reynolds Metals Company*, Alabama Supreme Court, No. 89-386 (Dec. 21, 1989), Slip Op. at 26. Therefore, it should be axiomatic that the franchise tax on foreign corporations violates the Commerce Clause.[1] However, the Alabama Supreme Court found that this discrimination was not unconstitutional discrimination under the Commerce Clause. In reaching this conclusion, the Alabama Supreme Court confused the purpose of the Commerce Clause and failed to apply the Commerce Clause test as set forth and required by the decisions of this Court.

A state tax will withstand scrutiny under the Commerce Clause if the tax: 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 279. Moreover, it is a fundamental principle that

> [n]o State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." [citations omitted] The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

[1] The Alabama trial court and Alabama Court of Civil Appeals both held that the State's method of taxing foreign corporations was unconstitutional. *Reynolds Metals v. White* and *White v. Reynolds Metals*, Brief of Petitioners General Motors Corporation, General Motors Acceptance Corporation, and GMAC Leasing Corporation, App. D and App. B.

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977). See, also, *Maryland v. Louisiana*, 451 U.S. at 754. The Alabama franchise tax scheme, on its face and in effect, violates the third prong of the *Complete Auto* test and, therefore, violates the fundamental principle of the Commerce Clause.

The decision of the Alabama Supreme Court is in complete conflict with the clear precedents of this Court. The Alabama Supreme Court, while acknowledging that the State's tax scheme is discriminatory, held that it was not sufficiently discriminatory to violate the Commerce Clause. *White v. Reynolds Metals, supra.* However, the Commerce Clause clearly prohibits a State from imposing any "heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States." *American Trucking Associations, Inc. v. Sheiner*, 107 S.Ct. at 2838. If a tax forecloses tax-neutral decisions and creates an advantage for in-state businesses by placing a discriminatory burden on out-of-state businesses, the State has violated the Commerce Clause. *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 402 (1984).

This Court has also held on several occasions that it is not necessary to know how unequal taxes are before finding a Commerce Clause violation. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 269; *Westinghouse Electric Corp. v. Tully*, 466 U.S. at 406, 407; *Maryland v. Louisiana*, 451 U.S. at 760. Ignoring the explicit language of this Court, the Alabama court created its own Commerce Clause test under which the existence of facial and practical discrimination is insufficient to find a statute constitutionally defective; requiring instead that there be what the court called "invidious discrimination." This test not only conflicts with the precedents of this Court, but in effect destroys the fundamental Commerce Clause protection for interstate businesses.

By holding that some degree of discrimination against interstate commerce is permissible, the decision below invites each State to determine how much discrimination against interstate commerce it will tolerate, subject only to this Court's power to establish limits in cases brought before it. Such an invitation ignores not only the clear holdings of this Court, *Westinghouse Electric Corp. v. Tully, supra; Bacchus Imports, Ltd. v. Dias, supra, Maryland v. Louisiana, supra*, but also the logic behind those holdings—the protection and encouragement of free trade among the States that is the very foundation of the Commerce Clause.

The dangers of the decision below reach far beyond the net worth tax at issue in this case. Nothing in the decision below itself, or in the rationale for that decision, limits its applicability to capital stock or net worth taxes; the standard can equally be applied to income, sales, or any other state-imposed tax. The decision below opens unlimited possibilities for the enactment of discriminatory tax schemes by all fifty States. In the case below, the discriminatory favoritism was accomplished by taxing domestic corporations using a lower tax base than in taxing foreign corporations; in other circumstances, a more favorable apportionment formula, special credits or deductions, optional structures, or even lower rates might be made available to local businesses.

Obviously, if this decision is allowed to stand, every State legislature will be encouraged to impose taxes that place a heavier burden on interstate taxpayers than its in-state taxpayers. As such legislation is enacted, the courts—and this Court in particular—will find themselves making fine line distinctions reminiscent of the era before *Complete Auto Transit*. Such distinctions inject unnecessary tax risks into a corporation's decision to operate or to refrain from operating in a particular State and preclude tax neutral decisions regarding interstate operations. Thus, the decision below inhibits rather

than promotes the free trade objective underlying the Commerce Clause.

The broad implication of the lower court's holding is that, under the Commerce Clause, discrimination against out-of-state taxpayers will be tolerated. This is contrary to all of the relevant decisions of this Court. If interstate business is to be protected from discriminatory state taxes, the decision of the Alabama Supreme Court must be reviewed.

CONCLUSION

For the foregoing reasons, the Committee on State Taxation of the Council of State Chambers of Commerce respectfully requests that the Petitioners' Petitions for Writ of Certiorari be granted.

Respectfully submitted,

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